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10 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

11 UNITED STATES,

12 Plaintiff,

13 v.

14 ALFONSO WILLIAMS, et al.,

15 Defendants.

Action No. CR 13-0764 WHO

DEFENDANTS' REPLY TO
GOVERNMENT MEMORANDUM
REGARDING PROPOSED
PROTECTIVE ORDER

Date: May 8, 2014

Time: 1:30 p.m.

Dept. Hon. William H. Orrick

17 **INTRODUCTION:**

18 In its Response the Government suggests that the defendants are attempting to take back
 19 areas of agreement previously settled. United States' Response To Defendants' Memorandum
 20 Re: Protective Order, (Hereafter "Gov. Response,") Doc. 96 at 1. However, that is not the case.
 21 Not all of the defendants were before the Court at the time discussions regarding a protective
 22 order were initiated. Some defense counsel volunteered to work on the parameters of an order,
 23 and they accomplished a great deal. However, these attorneys did not claim to have authority to
 24 bind all counsel, nor could they make that claim. Clients who were not then before the Court had
 25 no counsel to grant that authority. Accordingly, there was never an agreement regarding the
 26 provisions to which the defense now objects.

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1 **ARGUMENT:**

2 **I. THE GOVERNMENT'S REQUESTED ORDER IS NEITHER REASONABLE**
 3 **NOR NECESSARY**

4 The Government requests ex parte and under seal access to the defendants' discovery
 5 logs. The Government suggests that this is reasonable and necessary, but bases this argument on
 6 two mistaken assumptions. The first assumption is that a violation of the protective order must
 7 have occurred if copies of documents are found in the hands of people not covered by the
 8 protective order. The second assumption is that disclosure of the identities of the experts and
 9 consultants contained in the logs is inevitable. In effect, the Government would only be obtaining
 10 information to which it would be entitled in any case.

11 The mistaken nature of these assumptions will be discussed in turn.

12 **A. Documents Which The Government May Believe Are Protected Have**
 13 **Already Been Disclosed In Other Prosecutions And Accordingly Are Not**
Subject To The Proposed Order

14 The Government assumes that a violation of the protective order will have occurred if
 15 copies of protected documents are in the hands of persons not covered by the order. For example,
 16 the Government states:

17 [I]t must be emphasized that, by the proposed protective order, the government
 18 would only have access to the names of which eyes have seen the government's
 19 production *after a leak has occurred and with the authorization of the Court*. In
 20 other words, the government would be allowed to petition the Court to investigate
 21 only if confidential materials had been improperly made public

22 (Gov. Response at 2:27-3:3, emphasis in original.) This assertion is repeated at 5:2-4:

23 It is simply identifying the individuals with whom the attorney has shared the
 24 government's materials – materials that, by the time they would be viewed, *had*
 25 *already been leaked in violation of the Court's order*. (Emphasis added.)

26 This assumption on the part of the Government is simply not accurate. Crimes or other
 27 acts which are charged in the First Superseding Indictment as substantive crimes and/or overt
 28 acts in support of the RICO conspiracy have already been prosecuted in state or federal court. As
 an example, the defendants attached to their initial memorandum an information filed in the San
 Francisco Superior Court. *See* Doc. 91, Ex. B. That information alleged the same offense as that
 alleged as Overt Act S in this First Superseding Indictment. *See* Doc. 31 at 8: 6. Another
 example is Counts Three, Four, and Five of the Superseding Indictment. *See* Doc. 31 at 10:5-

1 11:20. Those counts involve the homicide of Calvin Sneed, which had also been charged in the
 2 San Francisco Superior Court. These are only two examples. Other offenses or overt acts alleged
 3 in the Superseding Indictment have also been charged previously in state court or federal court.

4 Discovery was provided by the prosecutors in these earlier prosecutions. The defendants
 5 in those cases may also have obtained relevant documents by other means. The result is that the
 6 Government may mistakenly believe that there has been a breach of the protective order when
 7 the copy of the document in question was actually independently obtained as a result of an earlier
 8 prosecution. A document obtained independently of this case would not be a protected
 9 document, and its dissemination, as defense counsel sees fit, would not be a violation of this
 10 Court's order.

11 The Government's request for an ex parte and under seal procedure by which it may
 12 obtain access to the defendants' discovery logs is a transparent attempt to gain access to these
 13 logs after depriving the defendants of the opportunity to demonstrate that no violation of the
 14 protective order has occurred, and that no investigation is needed. The Government's proposal is
 15 neither reasonable nor necessary.

16 **B. The Identities of The Defendants' Consultants and Experts Will Not**
 17 **Inevitably Be Disclosed**

18 The Government asserts that disclosure of defense experts and consultants would provide
 19 the Government with no more information than the Government would otherwise obtain: "At
 20 most, that would disclose the potential engagement of an expert or an investigator of some
 21 variety – no more than what the government would get in any event through the combination of
 22 Fed. R. Crim. P. 12.2 and 16(b)." Gov. Response at 5:17-19. This is incorrect.

23 Under Rules 12 and 16, the Government would be entitled to the identity of the defense
 24 experts, but only if that person were to be called as a witness. Under Fed. R. Crim. P. 12.2 and
 25 16(b)(1)(C), the defense has no obligation to disclose an expert who will not testify. If the Court
 26 grants the Government access to the defendants' discovery logs in the manner the Government
 27 proposes, the protections and procedures embodied in these rules would be eviscerated.

28 Further, the Government ignores that there is a timetable for disclosure, even if the Rules
 require that expert information be exchanged. The timetable is designed to ensure that the

1 defense need not disclose the names of experts, or the material provided to the expert, until there
 2 has been a reasonable opportunity for the defense to prepare, develop its defense, and then
 3 determine if this is a witness who should testify. *See* Defense Memorandum, Doc. 91 at 8:11-
 4 10:7. This timetable is not one, as the Government suggests, that requires disclosure “very early
 5 in the process.” *See* Gov. Response at 5:15. In fact, Rule 12.2 requires disclosure, if there is to be
 6 one, rather late in the process:

7 If a defendant intends to introduce expert evidence relating to a mental disease or
 8 defect or any other mental condition of the defendant bearing on either (1) the
 9 issue of guilt or (2) the issue of punishment in a capital case, the defendant
 10 must—within the time provided for filing a pretrial motion or at any later time the
 11 court sets—notify an attorney for the government in writing of this intention and
 12 file a copy of the notice with the clerk. The court may, for good cause, allow the
 13 defendant to file the notice late, grant the parties additional trial-preparation time,
 14 or make other appropriate orders.

15 Rule 12.2(b). Accordingly, notice of intent to introduce expert testimony need not be given until
 16 the time set for filing pretrial motions or at a later date set by the Court. Disclosure of expert
 17 identity and reports would occur after that. The Government’s proposed order ignores this
 18 timetable.

19 In sum, the procedure urged by the Government would force the disclosure of some
 20 information which is confidential and protected, and which would not be otherwise subject to
 21 disclosure. Even if some information were subject to later disclosure, the procedure urged by the
 22 Government would cause it to be disclosed prematurely. This is, again, neither reasonable nor
 23 necessary.

24 **II. THE DEFENDANTS’ VIEW OF THE WORK PRODUCT DOCTRINE IS NOT**

25 **OVERBROAD**

26 The Government asserts that the defendants’ view of the work product doctrine is
 27 overbroad. In support of that claim the Government relies on *United States v. Nobles*, 422 U.S.
 28 225 (1975), and notes that in that case the Supreme Court determined that an investigator’s notes
 were discoverable if the investigator testified about the notes. Gov. Response at 4:18-28. That
 argument merely makes the defendants’ point. If the defense experts were to testify, then
 discovery would be proper. However, until that time, this information is protected, and *Nobles*
 does not hold otherwise.

1 The Government also asserts that the discovery logs are not work product. However, the
 2 names of persons with whom the defense has consulted and the materials which they were
 3 provided by counsel are clearly work product. In *Exxon Corp. v. Federal Trade Commission*, 476
 4 F.Supp. 713 (D.D.C. 1979), cited by the Government (*see* Gov. Response at 5:22-25), Exxon
 5 sought the disclosure of economic panelists engaged by the F.T.C. as consultants in the case. 476
 6 F.Supp. at 717. The court rejected Exxon's argument that their names must be disclosed:

7 The attorney "work product" privilege includes material which might disclose an
 8 attorney's appraisal of factual evidence. [Citations and quotation marks omitted.]
 9 Defendants' concern that identification of the economic panelists could expose
 10 significant aspects of the Commission's theory of the Exxon case seems plausible
 in the context of this intensely litigated matter. Accordingly, the names of the
 economists are exempt from disclosure under exemption (b)(5) [of the Freedom
 of Information Act] as attorney "work product."

11 *Id.* (footnote omitted); *id.* at 719 The court later noted that "[t]he economists' names could be
 12 bright guides to defendants' theory of the Exxon case, particularly if disclosed to this
 13 sophisticated plaintiff. Defendants are therefore entitled to withhold those names pursuant to the
 14 attorney "work product" privilege of exemption (b)(5)."). What was true in *Exxon Corp.* is true
 15 here.¹

16 **III. ALLOWING THE GOVERNMENT EX PARTE AND IN CAMERA ACCESS TO** 17 **THE DEFENDANTS' DISCOVERY LOGS WOULD NOT RESULT IN A MORE** **EFFECTIVE PROTECTIVE ORDER**

18 The Government points to several examples of what it believes were prior leaks in other
 19 cases. These leaks were apparently unintentional. The Government then suggests that its
 20 proposed protective order will have more "teeth." Gov. Response at 3:15-17. However, that is
 21 not the case.

23 ¹ The Government also cites to *Oregon Health & Sci. Univ. v. Vertex Pharm., Inc.*, CIV. 01-
 24 1272-HU, 2002 WL 31968995 (D.Or. 2002), stating that "the District Court upheld turning over
 25 names of experts viewing materials, despite an objection that such a disclosure would invade the
 26 work product privilege." Gov. Response at 5:25-28. A reading of the entire opinion, however,
 27 discloses that the court directed that "*each party* is ordered to identify by name and city of
 28 residence each expert reviewing the other's confidential documents," and "*each party* will
 disclose to the other the name and city of residence of every expert who will review documents
 designated as confidential under the protective order." *Id.* at *8 (emphasis added). Further, that
 court was attempting to fashion a procedure which would protect the confidentiality of the
 parties' intellectual property and prevent their theft. That consideration is not present in this case.

There will be a record of who received discovery and what they received under either the Government's proposal or the defendants' proposal. That log will be available under either proposal should the Court determine that an investigation into a possible leak is appropriate. The significant difference between the two proposals is that under the defense version, the defendants would be given the opportunity to demonstrate that there was no violation, and therefore no need for an investigation. Adopting a procedure that will lead to searches for leaks where none occurred does not give more teeth to a protective order. Instead, it needlessly invades each defendant's protected trial strategy, preparation, and work-product, in violation of the Federal Rules. It would also violate the defendants' rights under the Fifth, Sixth, and Eighth Amendments, to due process, a fair trial, the effective assistance of counsel, and a reliable penalty determination.

CONCLUSION:

The Government raises, but does not advocate, the use of a taint team if the point is reached where the Court is contemplating the disclosure of a defendant's discovery log. However, the question of whether a taint team should be utilized is premature until Court is aware of the nature of the alleged violation and the type of investigation for which a disclosure is contemplated. Once that is known, the parties and the Court will be in a better position to determine if a taint team is appropriate.

In the meantime, the Government's request for ex parte and under seal access to the defendants' discovery logs is neither reasonable nor necessary and must be rejected.

DATED: April 24, 2014

Respectfully Submitted,

/s/

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On Behalf of All Defendants